

Black Economic Empowerment –A lawful initiative to obtain equality or reversed apartheid?

A MINOR FIELD STUDY IN SOUTH AFRICA

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Summary

When the African National Congress won the South African election in 1994, the white minority rule ended and a new era of peaceful political, social and economical transformation began. Black Economic Empowerment was, and still is, one of the main pillars of this process, developed and designed especially to overcome the racial, social and economic rift between white and black South Africans left by the apartheid regime. It was created to empower black people and enable them to become an integral part of the economy. The Black Economic Empowerment initiative is however one of great controversy and has as many critics as it has followers, especially the affirmative action part of it. Is Black Economic Empowerment a legal way of giving power back to South Africa's black population or an unlawful discriminatory system that includes repeating mistakes of the past?

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Acronyms

ANC – African National Congress

ANP – Afrikaner National Party

BEE – Black Economic Empowerment

B-BBEE – Broad-Based Black Economic Empowerment

DA – Democratic Alliance

DTI – the Department of Trade and Industry

ILO – International Labour Organization

NP – National Party

PAC – Pac African Congress

SACP – South African Communist Party

SIDA – the Swedish International Development Cooperation Agency

UDF – United Democratic Front

UN – United Nations

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Black Economic Empowerment –

A lawful initiative to obtain equality

or reversed apartheid?

We the people of South Africa, recognize the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity.

Preamble of the Constitution of the Republic of South Africa

I. INTRODUCTION

The above constitutes the beginning of the preamble of the new Constitution of the Republic of South Africa, adopted on the 8th of May 1996. This was two years after the important election that marked the end of the white minority rule and the beginning of a new era of political, social and economical transformation in the country. The Black Economic Empowerment¹ initiative was, and still is, one of the main pillars of that process, designed especially to overcome the racial and social rift between white and black South Africans left by the apartheid regime.

The new South African Constitution puts equality and safeguarding of fundamental human dignity in the center of the construction of the new democratic South Africa. The framework's main principle is equality before the law. Non-discrimination is now elementary. In 1994, the legislators however came to the conclusion that merely a prohibition of discrimination was

¹ In the document referred to as BEE

not going to be sufficient enough to transform the country. They recognized that the severe aftermath of apartheid needed to be fought with a reaction that included active measures. For the sole purpose of reaching equality, South African legislation therefore provide for special measures to be undertaken, to protect or advance persons, disadvantaged due to unfair discrimination. This, amongst other things, constitutes itself in the BEE initiative.

BEE has had a key role ever since the African National Congress² took over government power. From the very beginning it has been an object of a lot of both positive and negative critic. It is still a matter of great controversy, partly due to the affirmative action aspect of it. Some people argue that BEE is undoubtedly the best thing to happen in South African politics in decades and that it is the only way to bring South Africa back from the horror that was apartheid. At the same time there are voices claiming it constitutes a drag on the economy and the new regulations are merely a form of reversed apartheid.

1. Purpose and question at issue

In this master thesis I discuss the subject of Black Economic Empowerment in South Africa, first and foremost seen from a legal point of view. I focus on the affirmative action part of BEE and discuss whether or not the legal frameworks support it and if so; how the regulations are constructed. In this process I include both relevant national and international frameworks. I look into the legal structure and functions and if these result in generating violations of international conventions and humans right standards, e.g. the Universal Declaration of Human Rights. My thesis includes an analysis of the legal elements that embody the affirmative action part of the Black Economic Empowerment initiative, but I also put Black Economic Empowerment in a social, economical and political context where I discuss progress made, as well as trials and tribunals, relevant factors and events. I discuss the concept that is BEE; what it is, what led up to it, why it is important and what the positive and negative aspects of BEE are.

My thesis main questions;

- Is the affirmative action part of the Black Economic Empowerment initiative lawful, put in both a national and international context?
- What central legal elements embody the affirmative action part of the Black Economic Empowerment initiative?

² In the document referred to as ANC

My thesis will also include the following sub questions;

- What is Black Economic Empowerment?
- What is Broad-Based Black Economic Empowerment?
- What key historic events lead up to Black Economic Empowerment?
- What is the Black Economic Empowerment role in a social, economic and political context?
- What problems and solutions does the Black Economic Empowerment system entail?

1.1 Delimitations

In this thesis I only discuss the Black Economic Empowerment initiative in South Africa. Aware that similar systems prevail in other parts of the world, I however choose to refrain from doing any comparisons. I also do not discuss certain parts of BEE, such as BEE-rules and regulations that only have little or no connection to my purpose and questions at issue.

1.2 Methodology

Preparation of this master thesis has involved extensive research on Black Economic Empowerment, including a thorough desk review of BEE-material in the form of literature, education material, articles, websites and rapports, as well as relevant legislation and information on South African history. I did this to ensure a complete understanding and comprehensive knowledge of the subject.

To find out the latest progress and initiatives made regarding the issue of BEE, I have carried out several interviews with key people; professionals working closely with BEE-issues, holding great knowledge on the subject.

To get as an exhaustive portray of BEE as possible, I also interviewed South Africans without direct BEE-connection. I spoke to people of different age, gender, race and social class, searching for diverse opinions on BEE. It has been important to me to interview people that are for BEE, as well as those who are critics of it, as I want to present all sides of BEE.

During the course of working with this thesis it has been imperative for me to always seek the truth. Therefore I have used different information from several independent sources, to minimize the risk of getting false and subjective information as opposed to facts.

2. The history of South Africa

Many factors led up to the state that South Africa was in prior to 1994, and in several aspects even after that. To grasp the vital need for a substantial, fundamental change in the country, it is crucial to understand the magnitude of what actually happened there. Black Economic Empowerment needs to be put in an historical context for one to truly realize the need for a social, political and economical transformation. Therefore this thesis begins with a retrospect of the South African history and the events that shaped the country into a place with intolerable living conditions for the majority of its inhabitants.

2.1 Chronology of key events

1652 Dutch traders, Boers, landed and put up settlement at the Cape of Good Hope.³

1806 The British seized the Cape of Good Hope area. Many Boers trekked north to find own republics.⁴

1867 The first discovery of diamonds was made and spurred wealth. Immigration increased along with the subjugation of native people.⁵

1836 The legendary walk of the Boers, *the Great Trek*, began. They left the British ruled Cape province and started Transvaal.⁶

1845-75 Racial difference began under British colonial rule.⁷

1880 The first Anglo-Boer War took place and ended with British rule over Transvaal.

1899 The outbreak of the second Anglo-Boer War took place.⁸

1902 A peace treaty ended the Anglo-Boer war. Boer suffered devastating defeat against the British armies.

1910 The Union of South Africa formed.⁹

³ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 4-6

⁴ www.afrikagrupperna.se South Africa Chronology

⁵ www.afrikagrupperna.se South Africa Chronology

⁶ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

⁷ www.afrikagrupperna.se South Africa Chronology

⁸ www.afrikagrupperna.se South Africa Chronology

⁹ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

- 1911 The Mines and Works Act was passed, which legitimized the long-term mining practice where whites monopolized skilled jobs by effectively restricting black South Africans to semi-skilled and unskilled labor in the mines.¹⁰
- 1912 The South African Native National Congress (in 1923: ANC) formed as a protest against the constitution and laws that stripped black people of their rights.¹¹
- 1913 The Natives Land act was passed, which made it illegal for black people to purchase land from whites except in reserves. Black people were restricted to 8 percent of the South African land.¹²
- 1914 The National Party was formed, which white members later came up with the apartheid politic.
- 1921 The South African Communist Party¹³ was founded.
- 1923 The Natives Act was passed, which controlled black peoples movement into towns.¹⁴
- 1938 The passage of the Representation of Natives Act removed black people from the voters roll in the Cape.
- 1948 The Afrikaaner nationalist government was elected on platform of apartheid. The racial politics increased and became a part of the constitution. Until 1977 the party increased parliamentary majority in almost every election.¹⁵
- 1949 The Mixed Marriage Act was passed, which prohibited marriages between people of different races.¹⁶
- 1950 Two of the main pillars of apartheid, the Population Registration Act and the Group Areas Act, were passed. These uprooted millions from their homes and required every South African to be classified and registrated in accordance with their racial characteristics.¹⁷ Individuals social, political and educational rights were highly

¹⁰ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 6

¹¹ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

¹² *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

¹³ In the document referred to as SACP

¹⁴ www.afrikagrupperna.se South Africa Chronology

¹⁵ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 4-6

¹⁶ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 4-6

¹⁷ www.afrikagrupperna.se South Africa Chronology

determined by to which group one belonged. The Immorality Act was also passed, which made sex across colour line illegal.¹⁸

- 1952 A defiance campaign with mass protest and civil disobedience against apartheid laws took place.
- 1953 The Bantu Self-Government Act was passed, which established independent homelands for black tribes. The black people were registered as citizens of the homeland, and therefore only allowed to exercise political power there.¹⁹
- 1955 The Congress of the People adopted Freedom Charter, which became an ANC guide.²⁰
- 1957 The Immorality Act was passed, along with which it became illegal to display interest in conducting a relationship with a member of a different race.²¹
- 1959 The Pac African Congress was formed. The Extension of University Education Act was developed and made it illegal for the University of Cape Town and the University of Witwatersrand to admit non-white students.²²
- 1960 The Sharpeville massacre took place. When protesting against apartheid laws 69 people were killed by the police.²³
- 1961 South Africa became a republic outside the British Commonwealth and the opposition parties ANC and PAC were banned. Armed resistance movement started.²⁴
- 1963 The leaders of opposition party ANC was imprisoned, including Nelson Mandela who was sentenced to life behind bars.²⁵
- 1965 The proclamation R26 forbid the presence of people of different races at “any place of public entertainment”, unless they had government permit.
- 1966 H. F. Verwoerd, one of the primary architects of apartheid, was assassinated.

¹⁸ www.afrikagrupperna.se South Africa Chronology

¹⁹ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 4-6

²⁰ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 4-6

²¹ www.afrikagrupperna.se South Africa Chronology

²² *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

²³ The International Day for the Elimination of Racial Discrimination is observed annually on March the 21st.

²⁴ www.afrikagrupperna.se South Africa Chronology

²⁵ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

- 1970 The Bantu Homelands Citizenship Act was passed, which required that all black South Africans became citizens of one of the self-governing territories. When other developing economies in Africa were growing, the distortions in the economy started to lead South Africa to economic crisis.²⁶
- 1973 African workers went on a massive strike across the whole of South Africa.
- 1976 The Soweto uprising took place. It started as a protest against the impositions of the use of Afrikaans in African secondary schools. Police shot and killed demonstrating children. A tougher time began.²⁷
- 1977 UN Security Council imposed mandatory arms embargo on South Africa.
- 1983 United Democratic Front formed as an umbrella organization for approximately 600 anti-apartheid organizations.
- 1984 The low turn-out in the election for House of Representatives and the House of delegates (black and Indian) undermined the political credibility of a new tricameral constitution.
- 1985 The Langa Massacre took place and over 20 people were killed. It was a protest against the only symbolic colored and Indian representation in the parliament and to the living conditions of the black people. It became a catalyst for some of the most tumultuous years to come.²⁸
- 1985- 89 A state of emergency prevailed in South Africa.
- 1987 A meeting between ANC and Afrikaner intellectuals took place, and one senior ANC figure was released from prison.
- 1988 Restrictions were placed on 17 anti-apartheid organizations.
- 1989 A meeting took place between prisoner Nelson Mandela and president P.W Botha, who later resigned and was succeeded by F.W Klerk, who started the closure of apartheid politics. More senior ANC leaders were released.²⁹

²⁶ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 4-6

²⁷ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

²⁸ www.afrikagrupperna.se South Africa Chronology

²⁹ *After Mandela – The battle for the soul of South Africa*, Russel Alec, Chronology IX

- 1990 The ban on ANC, PAC and SACP was lifted and Nelson Mandela was released. President de Klerk initiated the repealing of the remains of the apartheid laws. Political violence increased.³⁰
- 1991 Negotiations on a democratic South Africa started, that eventually led to the signing of National Peace Accord. 17 parties and groups participated.³¹
- 1992 The Boipatong massacre took place where 46 people were killed. ANC protested by walking out on the ongoing negotiations to end apartheid, accusing National Party of involvement in the attacks.³²
- 1993 The apartheid constitution was abolished and the transitional Executive Council was installed.
- 1994 In the first democratic, non-racial election in South Africa's history, ANC won with 62,7 percent and Nelson Mandela was elected president.³³

2.2 Apartheid

Apartheid was adopted as a party slogan by the successful Afrikaner National Party³⁴ in the 1948 election. Through that it became evident to the outside world, even though it had been the party's official policy since 1945.³⁵ In practice however, it had prevailed in South Africa for decades for example through several pieces of legislation, which together marked the establishment of a South Africa as a state in which racial discrimination received official sanction. A few of them were e.g. the Native Labour Regulation Act of 1911 that made it a criminal offense for black people, to break a labor contract and the Dutch Reformed Church Act of 1911 that prohibited black people from becoming full members of the church. The Mines and Works Act of 1911 legitimized the long-term mining practice by where whites monopolized skilled jobs by effectively restricting black people to semi-skilled and unskilled labor in the mines, and the Natives Land Act of 1913 which separated South Africa into areas in which neither black people nor whites could own freehold land. Black people, who constituted two-thirds of the entire population, were restricted to approximately 8 percent of the land and white people, constituting around one fifth of the population, were given

³⁰ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

³¹ www.afrikagrupperna.se *South Africa Chronology*

³² www.afrikagrupperna.se *South Africa Chronology*

³³ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, Chronology IX

³⁴ In the document referred to as ANP

³⁵ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 5

approximately 92 percent. It also stated that black people could live outside their own lands only if employed as laborers by white people.

However, it was not officially apartheid politics until 1948. The word *apartheid* means *separateness* in Afrikaans – an appropriate name for the highly racist politic run by the all-white government, whose main goal was to achieve total separateness between people of different races in South Africa. This extended to every aspect possible; legally, socially, politically, geographically as well as economically.³⁶

Apartheid laws divided people into three major racial groups; *whites*, *blacks* and *coloured*.³⁷ At this time approximately 82 percent of the entire South African population consisted of black and coloured people.³⁸ Later a fourth category was added; *asians*. Collectively these groups were referred to as *blacks*.³⁹ These groups were systematically excluded from national involvement, and as time passed, the nation itself.

Even though racism, oppression and segregation of black people already existed in South Africa, the ANP took it further after the victorious election. This meant *whites only*- buses, railway carriages, ambulances, hospitals, park benches, beaches, swimming pools, libraries, schools and toilets, to name a few.⁴⁰ Over-stepping these boundaries would result in severe punishments, regardless of race.

The above mentioned however, was known as *petty apartheid*.⁴¹ *Grand apartheid* refers to the ANP goal of total territorial segregation of the races, amongst others, involving the *Homeland system* and stripping blacks of the last remains of their central political rights.⁴² A majority of South African's were confined to "homeland" areas, which were some of the poorest in South Africa in terms of living conditions, infrastructure and business opportunities and lacking in dynamic business infrastructure and environment.⁴³ Four homelands within South Africa achieved full independence but no other country ever recognized them as independent states.

³⁶ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 2

³⁷ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 25

³⁸ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 25

³⁹ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 25

⁴⁰ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 27

⁴¹ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 27

⁴² *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 27

⁴³ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 6

The people living in the homelands lost their South African citizenship. The ultimate goal for ANP leaders was to have a South Africa, without any black South Africans in it.⁴⁴

Another dimension of apartheid connected to the Homeland system was the labour policy of the ANP.⁴⁵ The Industrial Conciliation Act of 1956 empowered the government to decide what types of jobs individuals of certain races could have. Black and coloured people could no longer work where, or with whatever, they wanted or were educated for. According to party policy, the presence of blacks in the “white” South Africa was dependant of their capacity to serve the needs of the white society. Elaborate restrictions were put on the African labour movement, and made it impossible for black people to work in skilled or semi-skilled positions.⁴⁶ Those types of jobs were held first and foremost for the Afrikaans people. Jobs that were considered “not suiting” for white people, black people could have, which always meant serving the white society. A black person that was not working in an urbanized white area needed a special permit if he/she were to remain in that area for more than 72 hours.

The job reservation policy was reinforced by a truly inferior education system for black people. This had a devastating effect on their skills which had a huge impact on the labour market and the positions that the majority of workers could obtain.⁴⁷

At this time many Afrikaans had a low standard of living. Therefore they supported this system as it gave them opportunities and good state jobs that they had not had before.⁴⁸ The Afrikaans had for a long period of time felt oppressed by the English and many now felt that they had gotten their country back.

It was during one of the main architects of apartheid, Henrik Verwoerds premiership 1956 - 1966, that apartheid reached its ultimate height, where it intruded on every possible aspect of a person’s life. The apartheid politic far extended and systematically institutionalized the already existing racial segregation in South Africa, and purposefully restricted the majority of South Africans from meaningful participation in the economy.⁴⁹ Assets of millions were directly or indirectly destroyed and access to skills and self-employment was racially

⁴⁴ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 27

⁴⁵ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 28

⁴⁶ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 28

⁴⁷ South Africa’s Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 7

⁴⁸ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 28

⁴⁹ South Africa’s Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 4, www.southafrica.info/business/trends/empowerment/bee.htm

restricted.⁵⁰ Apartheid ensured that creation of wealth was confined to a white minority and imposed underdevelopment on black communities.⁵¹ This was the South African official system for almost half a century, with laws determining where people could live, what kind of jobs they could have, what education they should get, who to vote for, who to love, and who to marry. Despite rioting and terrorism at home, isolation from the world society during the second half of the twentieth century, the white regime maintained this system of racial discrimination that made South Africa a pariah in the eyes of the world, with only minor relaxation, until February 1991.⁵² F.W de Klerk had then become president and announced that the remaining legislative pillars of apartheid; the Registration Act, the Group Areas Act and the Native Land act, would be repealed.⁵³ Shortly after that he started negotiations with ANC and the newly released Nelson Mandela.⁵⁴

Apartheid became a matter of global controversy, and the continuing resonance of the word apartheid, 15 years after its demise, shows how deeply the world was affected by it.

We are not in the period of transition as passive spectators. We are part of this transition and we can shape it. In shaping and fashioning the history curriculum we are ourselves making history. We are giving shape both to the history of the present and the future.

Neville Alexander, anti-apartheid political activist and educationalist, 1993

II. BLACK ECONOMIC EMPOWERMENT

3. The Beginning of Black Economic Empowerment

The 1994 elections marked the definite end of the exclusive white people rule and the beginning of the new era of a South Africa starting the long and hard process of change.⁵⁵ As the ANC shifted from its former liberation agenda toward a leadership role in government, ANC economists, together with government and private-sector consultants, started developing the blueprint for the development of the new landscape of South Africa. The newly elected

⁵⁰ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 4, *The definitive BEE hand book*, Akollo, H. Ossang, p 8

⁵¹ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 4

⁵² *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 2

⁵³ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 17

⁵⁴ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 17

⁵⁵ *State of the nation South Africa 2004-2005*, Daniel, John, Southall, Roger, Lutchman, Jessica, intro

government, led by Nelson Mandela, was truly committed to altering the racial patterns characterizing the country and its economy. The country they inherited was a country with deep social scars and an economy in a severe structural crisis, with low economic growth, international economic exclusion and underdevelopment.⁵⁶ The distortions in the economy during apartheid had during the 1970s started an economic crisis when domestic economic growth fell to zero, with only a couple of percents raise during the 1980s and the beginning of the 1990s.⁵⁷ At a time when other developing economies with similar resources had been growing, South Africa had been stagnating.⁵⁸

As described above, apartheid had meant a systematic dispossession and disempowerment of all black and coloured people, with a highly deliberate denial of access to e.g. education, work and ownership opportunity. The government realized that the country needed an equally systematic response to achieve redress, particularly in the context of globalization and the need for accelerated economic growth to eradicate poverty.⁵⁹ Capitalist growth, privatization and foreign investment were at this time key features of the South African economic and political environment, as were job creation and better living standards for the black population.⁶⁰ To achieve these goals the government developed a broad range of laws, policies and institutions to guide the transformation. The ANC recognized that if the substantive changes that needed to take place were to happen, South Africa needed an active and comprehensive approach to transformation. Black Economic Empowerment was in 1994, and is still, the cornerstone of this process.

Black Economic Empowerment was designed not only as a moral initiative to redress the wrongs of the past, but also to form the base and provide the right conditions for economic growth. At this time, BEE was mainly an economic growth strategy, targeting the South African economy's weakest point: inequality.

⁵⁶ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 7

⁵⁷ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 6, www.southafrica.info/business/trends/empowerment/bee.htm

⁵⁸ www.southafrica.info/business/trends/empowerment/bee.htm

⁵⁹ *The definitive BEE hand book*, Akollo, H. Ossang, p 10

⁶⁰ *The young, the wealthy and the restless*, Bourgouin Frank, p 10

No economy can grow by excluding any part of its people, and an economy that is not growing cannot integrate all of its citizens in a meaningful way.

As such, this strategy stresses a BEE process that is associated with growth, development and enterprise development, and not merely the redistribution of existing wealth.

Department of Trade and Industry – BEE strategy Document

Black Economic Empowerment was, and is still, a strategy to empower the previously disadvantaged people, make them an important and integral part of the economy and give them opportunities like education and jobs, that they had been neglected for a long time. Parts of the BEE system aims towards redressing the imbalances in ownership and control of South Africa's economic resources, by increasing black participation at all levels of the economy. At this time, specific aims of the Black Economic Empowerment strategy included the development of a visible black middle class, the improvement of skills within the black population and increasing black ownership and management within the economy.⁶¹ The people belonging to the previously disadvantaged groups, which in these contexts commonly is referred to as "black people", are the categories of persons who were disadvantaged by unfair discrimination on the basis of race and gender; Africans, Coloured, Indians, black women, but also the youth and the physically disabled.⁶² In practice, Black Economic Empowerment was to be obtained by;

- Job creation
- Specific measures to empower the previously disadvantaged
- Poverty alleviation
- Skills and management development
- Increased black ownership
- Increase of black people in key positions
- Access to financial means to conduct business
- Rural development
- Urban renewal

⁶¹ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

⁶² *The definitive BEE hand book*, Akollo, H. Ossang, p 11, Black Economic Empowerment Supplier Questionnaire, 2008, p 8

3.1 Black Economic Empowerment and Affirmative Action

Seeing as how the injustices after apartheid were and still are, substantial, in particular in the labour market, a big part of Black Economic Empowerment targets just that.⁶⁴ Black Economic Empowerment is not the equivalent of affirmative action per say, but employment equity as well as education equity is a central, integral part of the Black Economic Empowerment system, which results in affirmative action measures taking place.

The ANC government recognized that it was unlikely for the injustices to stop relying solely on anti-discrimination legislation. Hence, affirmative action was legally introduced to target the incongruities. The BEE affirmative action regulations provide for active measures to help and advantage people that previously had been disadvantaged due to apartheid. It mandates e.g. business owners, to undertake special measures to overcome the distortions in the labour market as well as provide new economic opportunities for the historically disadvantaged. It permits disadvantaged people or groups, or people of the underrepresented sex, to be given priority in for example an employment situation or when in competition to be accepted to an education.⁶⁵ When two people merits are considered equal in every way, to further Black Economic Empowerment, the decision maker would choose the applicant belonging to a disadvantaged group or sex. It aims to ensure that qualified people from previously disadvantaged groups have greater possibilities to employment and representation in all occupational groups and company levels. The previously disadvantaged individuals and groups that the legislation first and foremost targets are black people, women and the physically disabled. Through this, previously disadvantaged people are able to get employment, which creates a diverse labour market where people of all colours work at all positions. Many of the new laws are focused on employment and contain rights and rules regulating the conditions for e.g. the employment situation or after a person become an employee.

⁶³ *The definitive BEE hand book*, Akollo, H. Ossang, p 11, Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

⁶⁴ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

⁶⁵ www.sverigemotrasism.nu

III. LEGISLATION

4. National legislation

The main principle that leavens through the new Constitution of the Republic of South Africa⁶⁶ is the one of equality. Non-discrimination is now fundamental. As mentioned above however, one of the main pillars of the Black Economic Empowerment system is reaching equity through affirmative action measures, even if that result in an act that in itself in principle is discriminatory.

These two ideas are fundamentally incompatible and would not only be a contradiction in itself, but also overthrow the law and make the whole concept of Black Economic Empowerment unfeasible, was it not for the vital exception of, to promote equality, only prohibiting *unfair* discrimination. The relevant rules in the Constitution is designed as such as they only disallow unfair discrimination, and permits discrimination against the previously advantaged, to advantage the ones who has been previously disadvantaged due to unfair discrimination. Conduct as such, is not legally considered to be unfair discrimination and is therefore permissible.

In the preamble of the Constitution on the Republic of South Africa, its main purpose is stated. It says the Constitution has been adopted as the supreme law of the Republic, so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, and to lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.⁶⁷ This does not explicit mention anything about affirmative action but it provides conditions for it.

The article that first and foremost regulates affirmative action in the Constitution of the Republic of South Africa is article 9.

⁶⁶ In the document referred to as the Constitution

⁶⁷ The preamble of the Constitution of the Republic of South Africa

9. Equality

- (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that that discrimination is fair.¹*

Constitution of the Republic of South Africa

As mentioned above, legislators came to the conclusion that merely changing rules and laws to rule out discrimination was not going to be enough to be able to make the substantial changes necessary to transform the country, as well as the economy. The severe aftermath of apartheid needed to be fought with a response that included active measures. For the sole purpose of reaching equality, article 9 of the Constitution therefore constitutes special provisions that targets inequalities, that allows for measures to be undertaken, to protect or advance persons disadvantaged due to unfair discrimination, as long as the conduct in itself, is not considered unfair discrimination.⁶⁸ This constitutes itself in the affirmative action part of the BEE initiative.

Initially article 9 states that *everyone is equal before the law and has the right to equal protection and benefit of the law.*⁶⁹ That is followed by article 9 (2), that states that *equality includes the full and equal enjoyment of all rights and freedoms*, and continues by stipulating that in the purpose to promote the achievement of equality, one may undertake legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.⁷⁰ There is a presumption of discrimination in the continuing part of the paragraph; neither the state, nor a person, may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, ethnic origin, colour, sexual orientation, disability, religion and culture etc, and national

⁶⁸ The Constitution of the Republic of South Africa, article 9

⁶⁹ The Constitution of the Republic of South Africa, article 9 (1)

⁷⁰ The Constitution of the Republic of South Africa, article 9 (2)

legislation must be enacted to prevent or prohibit such unfair discrimination.⁷¹ Discrimination on one or more of the grounds listed above, is considered unfair unless it is established that the discrimination is fair, which the article establish the conditions for.

Hence, even though the main principle of the Constitution is equality before the law and article 9 lists a highly inclusive catalog of grounds of non-discrimination, to reach equality it is allowed to undertake different measures, to protect or advance persons, disadvantaged due to unfair discrimination. Discrimination is in principle permitted, as long as it is considered fair.⁷²

The affirmative action part of BEE also receives legitimate status through article 217 in the Constitution, which allows government authority, when contracting for goods or services, to implement a procurement policy providing for categories of preference in the allocation of contracts, as well as for the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.⁷³ Hence, following BEE by taking active measures against discrimination on the labour market is something that actors of both the public and the private sector are doing.

When white minority rule had been torn down and the ANC took over government power, legislators not only changed the Constitution to fit the needs of a democratic South Africa, but they also embarked upon a comprehensive programme to provide several other legislative frameworks that was strong enough to uphold a major renovation of the economy. The new Constitution was only the first step. Numerous laws supporting BEE were created, which aimed at dismantling the machinery of apartheid and transforming society, through e.g. restoration of the right to land and tenure, the prohibition of unfair discrimination, the introduction of specific active measures to overcome the distortions in the labour market and development of education and work possibilities.⁷⁴

In 1998 the Employment Equity Act⁷⁵ became law, which premier goal was to obtain equality in the labour market, fair treatment through the elimination of unfair discrimination and the implementation of affirmative action measures to redress the disadvantages that were experienced by designated groups, to ensure that they are represented in all occupation

⁷¹ The Constitution of the Republic of South Africa, article 9 (5)

⁷² The Constitution of the Republic of South Africa, article 9

⁷³ The Constitution of the Republic of South Africa, article 217

⁷⁴ *The definitive BEE hand book*, Akollo, H. Ossang, p 8

⁷⁵ In the document referred to as the Act

categories and levels.⁷⁶ However, it is not considered to be unfair discrimination to take affirmative action measures, as is specified by the Act.⁷⁷

CHAPTER 2
Prohibition of unfair discrimination

5. Elimination of unfair discrimination

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any policy or practice.

6. Prohibition of unfair discrimination

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, coclour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to –

a) take affirmative action measures consistent with the purpose of this Act; or

b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

Employment Equity Act

5th § obligates all employers to take steps to promote equal opportunity in the working place, by the elimination of all unfair discrimination in any policy or practice.⁷⁸ Hence, the paragraph enjoins the employer active measures. 6th § stipulates that no person may unfairly discriminate, directly or indirectly, against an employee, on one or more of the listed grounds, e.g. race, sex, HIV-status, religion, sexual orientation etc.⁷⁹ 6th § (2) a) clearly states that it is not unfair discrimination to take affirmative action measures, as long as they are in accordance with the purpose of the Act.⁸⁰ According to 6th § (2) b) it is also not considered to be unfair discrimination to prefer, exclude, or distinguish any person on the basis of an inherent requirement of a job.⁸¹

⁷⁶ *The definitive BEE hand book*, Akollo, H. Ossang, p 40

⁷⁷ *The definitive BEE hand book*, Akollo, H. Ossang, p 40

⁷⁸ The Employment Equity Act, 2:5 §

⁷⁹ The Employment Equity Act, 2:6 §

⁸⁰ The Employment Equity Act, 2:6 (2) a) §

⁸¹ The Employment Equity Act, 2:6 (2) b) §

Even though the Act does not offer any exhaustive, distinct definitions of what conduct exactly is unfair discrimination, 6th § (2) a) and b) give clear examples. 6th § (3) also stipulates that harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in the subsection (1).⁸²

Chapter 3 of the Act regulates the implementation of affirmative action. It only applies to designated employers and is considered a prerequisite for every designated employer to achieve employment equity.⁸³

Furthermore, to enhance the protection in the Act it also contains a presumption of discrimination. Thus, if an allegation is made in terms of the Act, the employer accused must establish that the conduct in question as such is fair.⁸⁴

5. International legislation

Apartheid was labelled a crime against humanity by the United Nations General assembly as early as 1966.⁸⁵ There are numerous international conventions and frameworks today that not only consolidate the freedoms and rights of every human being, but also condemn discrimination in any way, shape or form, especially such based on racial, ethnic or cultural circumstances.

In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human rights.⁸⁶ This constitutes the primary framework of fundamental human rights in the international society, and the commitment made by its State Parties obligates them to certain actions.

The first article of the Declaration stipulates that all human beings are born free and equal in dignity and rights and that they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.⁸⁷ It is the fundamental article of the Declaration.

⁸² The Employment Equity Act, 2:6 (1) §

⁸³ *The definitive BEE hand book*, Akollo, H. Ossang, p 40

⁸⁴ The Employment Equity Act, 2:11 §

⁸⁵ *Rethinking the rise and fall of apartheid*, Guelke, Adrian, p 1

⁸⁶ In the document referred to as the Declaration

⁸⁷ The Universal Declaration of Human Rights, article 1

This is followed allow by article 2 in the Declaration, which stipulates that *everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race or colour etc.*⁸⁸

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non self-governing or under any other limitation of sovereignty.

The Universal Declaration of Human Rights

The protection from and prohibition of non-discrimination is further enhanced in article 7, which states that *all are equal before the law and are entitled without any discrimination to equal protection of the law*. It continues by stating that *all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*⁸⁹

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

The Universal Declaration of Human Rights

Hence, the freedoms of every human being are clearly stated, and the principles of equality and non-discrimination are strongly fortified as two of the most fundamental human rights. However, there is nothing here that explicitly provides for affirmative action for this to be obtained. A highly extensive interpretation of article 2 and article 7 may be possible. First and foremost however should one look to article 28 and article 29 for this purpose. Article 28 states that *everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized* – a formulation which constitutes a potential way of permission of measures like affirmative action to be undertaken.⁹⁰ Neither does article 29 explicitly mention affirmative action measures however article 29 (2) provides a clear regulation of it. The article states that in the exercise of rights and freedoms, *everyone*

⁸⁸ The Universal Declaration of Human Rights, article 2

⁸⁹ The Universal Declaration of Human Rights, article 7

⁹⁰ The Universal Declaration of Human Rights, article 28

*shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*⁹¹

Part (3) in the same article states that *these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.*⁹² This is a more clear permission of measures such as affirmative action to be undertaken, as *limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others*, exactly constitutes the presence of lawful affirmative action.

As mentioned above, equality and the right not to be discriminated against because of race or skin colour are two of the most fundamental human right principles we have in the international society today and thus, two of the cornerstones in the work for human rights observance. Except for the Universal Declaration of Human rights, the premier international tool there is for this is the United Nations International Convention on the Elimination of all forms of Racial Discrimination.⁹³ This Convention was proclaimed by the General Assembly in 1963 and adopted by South Africa in 1998.⁹⁴ The Convention aims to guarantee all people, despite origin or race or skin color, absolute right to all human rights.⁹⁵ When South Africa ratified the Convention they committed to certain obligations, amongst the more important ones, the strive for equality.

The first article of the Convention constitutes a definition of racial discrimination in (1), which accordingly mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁹⁶

⁹¹ The Universal Declaration of Human Rights, article 29

⁹² The Universal Declaration of Human Rights, article 29

⁹³ In the document referred to as the Convention

⁹⁴ www.manskligarattigheter.gov, Ministry of Foreign Affairs report; *Mänskliga rättigheter i Sydafrika 2007*

⁹⁵ www.unchr.ch, www.ohchr.org

⁹⁶ International Convention on the Elimination of All Forms of Racial Discrimination, article 1 (1)

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

International Convention on the Elimination of All Forms of Racial Discrimination

(4) in the article however stipulates that *special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination*, which clears an evident path for measures of affirmative action to be undertaken.⁹⁷ As long as such measures do not lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.⁹⁸

⁹⁷ International Convention on the Elimination of All Forms of Racial Discrimination, article 1 (4)

⁹⁸ International Convention on the Elimination of All Forms of Racial Discrimination, article 1 (4)

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;*
- (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;*
- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;*
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;*
- (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.*

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

International Convention on the Elimination of All Forms of Racial Discrimination

In article 2 (1) the Convention goes further by obligating State parties to take active measures as to counteract any possible occurrence of such racial discrimination. It states that States Parties undertake to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms and promoting understanding among all races and shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.⁹⁹ Article 2 (2) of the Convention obligates States Parties to, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and

⁹⁹ International Convention on the Elimination of All Forms of Racial Discrimination, article 2 (1), (1) c)

fundamental freedoms.¹⁰⁰ As in article 1, article 2 stipulates that these measures shall in no case however entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.¹⁰¹

Article 3 of the Convention specifically and explicitly regulates apartheid and how States Parties particularly condemn it and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.¹⁰²

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 5 in the Convention repeats that State Parties, in compliance with the fundamental obligations laid down in article 1 and article 2 of the Convention, undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of economic, civil and social rights.¹⁰³ The article continues by listing these rights, which e.g. are political rights; the right to vote, participate in elections and take part in the government, civil rights; the right to freedom of movement and residence, the right to nationality, the right to marriage, the right to own property, the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression, economic, social and cultural rights; the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration, the right to medical care, social security and social services, the right to education, the right to equal participation in cultural activities and the right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.¹⁰⁴

Hence, there is nothing in neither the national frameworks, nor the international frameworks, that would prevent, or in any way act as a deterrent, to the employment of affirmative action

¹⁰⁰ International Convention on the Elimination of All Forms of Racial Discrimination, article 2 (2)

¹⁰¹ International Convention on the Elimination of All Forms of Racial Discrimination, article 2 (2)

¹⁰² International Convention on the Elimination of All Forms of Racial Discrimination, article 3

¹⁰³ International Convention on the Elimination of All Forms of Racial Discrimination, article 5

¹⁰⁴ International Convention on the Elimination of All Forms of Racial Discrimination, article 5

measures in order to eliminate racial discrimination and ensure equality before the law, including the full and equal enjoyment of all human rights and freedoms. On the contrary, they either encourage it or oblige for it, e.g.; *...take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights... or; ...special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups...* Both national and international legislation however stipulate that this can only take place provided that these measures do not lead to the maintenance of separate rights for different racial groups and that they shall not continue after the objectives for which they were taken have been achieved. Both the national and the international frameworks define racial discrimination in similar ways, but deem measures such as these as sometimes necessary. Both national and international legislation provides for many of the same fundamental freedoms of human rights, several of which are the same ones that a majority of the South African people during apartheid were neglected. Both national and international legislation agree that special measures, such as affirmative action, should or must, be undertaken, for these rights and freedoms to be equally enjoyed by every human being in a society.

Consequently, affirmative action regulations give the employer the legal right to employ a previously disadvantaged person, for that very reason. The legislation discussed above provides the right conditions for such an act. The legislation even entails the legal right for a previously disadvantaged person, to forcefully demand to be treated in accordance with the stipulations that constitute the affirmative action element of Black Economic Empowerment.¹⁰⁵ The rules entitle a previously disadvantaged person, with sufficient qualifications, the right to demand to be given priority.¹⁰⁶ However, merely to an extent. According to chapter 3:20 § of the Employment Equity Act, *designated employers must prepare and implement an employment equity plan, which will achieve reasonable progress towards employment equity in that employer's workforce.*¹⁰⁷ The employment equity plan is

¹⁰⁵ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹⁰⁶ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹⁰⁷ The Employment Equity Act, 3:20 §, Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

submitted to the Department of Labour.¹⁰⁸ It must e.g. include the objectives to be achieved for each year, the affirmative action measures to be implemented, the duration of the plan – which may not be shorter than one year or longer than five years – and the procedures that will be used to monitor and evaluate the implementation of the plan.¹⁰⁹ As long as a discriminating act is in line with the goals set out in that employment equity plan, it is not considered unfair.¹¹⁰ If the employer however by choosing a previously disadvantaged person goes beyond the goals set up in the employment equity plan, the person with better qualifications competing for the same position can make a claim as him or her is being overlooked and discriminated against. That employee, or applicant for employment, may refer a dispute concerning alleged unfair discrimination to the Commission for Conciliation, Mediation and Arbitration¹¹¹ for conciliation.¹¹² This must be done within six months of the alleged discrimination. If the dispute is not resolved at conciliation, a party may refer it to the Labour Court for adjudication.¹¹³ The parties to a dispute may also agree to refer the dispute to arbitration. There have been a number of cases regarding this, e.g SAPU obo Lotter versus SAPS (CCMA), Utatu versus Transnet Limited (Affiliation of Multicultural Societies and Service Agencies) and Coetzer and 11 others versus Minister of Safety and Security (Labour Court).¹¹⁴

IV. BEE DEVELOPING - BROAD-BASED BLACK ECONOMIC EMPOWERMENT

The vision of an economy that meets the needs of its people in an equitable manner goes back to the ANC Freedom Charter of 1955.¹¹⁵ This was refined and developed in a contemporary context in the ANC Reconstruction and Development Programme¹¹⁶ in 1994, which was developed to tackle the economic challenges of the new South Africa.¹¹⁷ RDP was the ANC manifesto at the 1994 election. The central objective of the RDP was to de-racialise business ownership and control completely *through focused policies of black economic*

¹⁰⁸ The Employment Equity Act, 3:21 §

¹⁰⁹ The Employment Equity Act, 3:20 §

¹¹⁰ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹¹¹ In the document referred to as CCMA

¹¹² The Employment Equity Act, 2:10 §

¹¹³ The Employment Equity Act, 2:10 §

¹¹⁴ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹¹⁵ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 4

¹¹⁶ In the document referred to as RDP

¹¹⁷ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 4

empowerment.¹¹⁸ The government's approach was to situate black economic empowerment within the context of a broader national empowerment strategy, which focused on the historically disadvantaged people. RDP was however soon replaced by Growth Employment and Redistribution programme¹¹⁹ that was put into action in 1996.¹²⁰ GEAR evolved from RDP and had many of the same ambitions for a new economic order, focusing primarily on the importance of economic growth. The government however saw GEAR to be an improvement from RDP.¹²¹

However, with a big change like the country was facing in 1994, obstacles were bound to occur. The first few years after the end of apartheid, the South African economic reform policies largely failed.¹²² In the beginning of Black Economic Empowerment, the government lacked a coherent strategy towards Black Economic Empowerment implementation.¹²³ They focused primarily and almost exclusively on the elements of ownership and management of entities by black people.¹²⁴ Black ownership however was at that time less than 1 percent.¹²⁵ The overall approach to Black Economic Empowerment was severely lacking in focus and overarching strategic frameworks.¹²⁶ The RDP and GEAR had not worked as planned.

Admittedly, some of the promised changes had been fulfilled; over a million new houses had been built and hundreds of thousands households now had electricity.¹²⁷ However, the two programmes had rather enhanced the rift between the black and the white people in the already divided South Africa, than erased it. Adding to that was the fact that white businessmen now started to blame the unsuccessful economic re-distribution on the new black businessmen. The economy was not making progress the way the government had hoped. Hundreds of thousands lost their jobs. The injustices remained, or grew, and the majority of people remained poor.¹²⁸

¹¹⁸ The Reconstruction and Development Programme, point 4.4.6.3, p 93, *The definitive BEE hand book*, Akollo, H. Ossang, p 44

¹¹⁹ In the document referred to as GEAR

¹²⁰ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment p 10, www.afrikagrupperna.se

¹²¹ *The definitive BEE hand book*, Akollo, H. Ossang, p 47

¹²² *Making Mistakes, Righting Wrongs*, Gqubule, Duma, p 103

¹²³ *The definitive BEE hand book*, Akollo, H. Ossang, p 10

¹²⁴ *The definitive BEE hand book*, Akollo, H. Ossang, p 10

¹²⁵ *Making Mistakes, Righting Wrongs*, Gqubule, Duma, p 103

¹²⁶ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment p 10

¹²⁷ www.sverigemotrasism.nu

¹²⁸ www.sverigemotrasism.nu

On the 29th of May 1998, the former South African president Thabo Mbeki made his Two Nations speech, putting into simple words the complicated state of the nation;

A major component part of the issue of reconciliation and nation building is defined by and derives from the material conditions in our society which have divided our country into two nations, the black one and the other white. We therefore make bold to say that South Africa is the country of two nations. One of these is white, relatively prosperous, regardless of gender or geographic dispersal. It has ready access to a developed economy, physical, educational, communication and other infrastructure... The second and larger nation of South Africa is black and poor, with the worst affected being women in the rural areas, the black rural population in general and the disabled. This nation lives under conditions of a grossly underdeveloped economic, physical, educational, communication and other infrastructure. It has virtually no possibility to exercise what in reality amounts to a theoretical right to equal opportunity, with that right being equal within this black nation only to the extent that it is equally incapable of realization. This reality of two nations, underwritten by the perpetuation of the racial, gender and spatial disparities born of a very long period of colonial and apartheid white minority domination, constitutes the material base which reinforces the notion that, indeed, we are not one nation, but two nations.

Former president, Thabo Mbeki, "Two Nation Speech", 1998

Political power had shifted from white to black hands, but white domination remained rulers of the economy, with the exception of merely a small number of people. Therefore only a handful of individuals seemed, at least to the public eye, to be benefiting from the BEE. Because of this, it later became known as the narrow-based BEE.¹²⁹

Hence, BEE became the focus of growing criticism and dissatisfaction.¹³⁰ The government was forced to review the legal and policy frameworks and ended up moving from a largely persuasive approach to a more assertive one. They realized that society, individuals everywhere, on every position, had to be more directly involved in the Black Economic Empowerment process in order to achieve the results they strived for.¹³¹ The utopian vision of

¹²⁹ *The definitive BEE hand book*, Akollo, H. Ossang, p 5

¹³⁰ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹³¹ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

a quick transition to a healthy and well-adjusted South Africa was replaced by a more realistic approach to the country's problems, where the segregation once again was vocal point of attention. Black Economic Empowerment started to be groomed to a more broad-based approach, where the problems of the past were being addressed directly.¹³²

In 2000 the BEE commission released a report which was the first attempt to broadly defining BEE.¹³³ Three years later the new Broad-Based Black Economic Empowerment Act¹³⁴ came and became law. The B-BBEE Act defined Broad-Based Black Economic Empowerment¹³⁵ as an integrated and coherent socio-economic process that directly contributed to the economic transformation of South Africa.¹³⁶ This includes human resource and skill development, employment equity, enterprise development, preferential procurement, as well as investment and an increased number of black people on positions in management and ownership.¹³⁷

The B-BBEE Act provided for the development of the B-BBEE strategy document; South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment¹³⁸ as well as for the Codes of Good practice.¹³⁹ The Strategy Document provides for a uniform approach to the new B-BBEE for both public and private organs and now constitutes a integral part of the B-BBEE machinery.¹⁴⁰ The intention of the Codes of Good Practice was to level the playing field by providing clear and comprehensive criteria for the measurements of B-BBEE, to help companies to end some of the uncertainty surrounding empowerment deals.¹⁴¹ It was also developed to boost South Africa's economic growth. The final draft of the Codes of Good Practice was released in 2004, and became law in February 2007. The Codes of Good Practice now provide a standard of measurement and implementation of B-BBEE across all sectors of the economy, as well as the key principles of B-BBEE.¹⁴² They are to be applied in the development, evaluation and monitoring of BEE charters, initiatives, transactions and other implementation mechanisms and constitute a

¹³² *The definitive BEE hand book*, Akollo, H. Ossang, p 4, Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹³³ *The definitive BEE hand book*, Akollo, H. Ossang, p 20

¹³⁴ In the document referred to as the B-BBEE Act

¹³⁵ In the document referred to as B-BBEE

¹³⁶ Broad-Based Black Economic Empowerment Act p 4, *The definitive BEE hand book*, Akollo, H. Ossang, p 21

¹³⁷ Broad-Based Black Economic Empowerment Act p 8

¹³⁸ In the document referred to as the Strategy Document

¹³⁹ *The definitive BEE hand book*, Akollo, H. Ossang, p 5

¹⁴⁰ Broad-Based Black Economic Empowerment Act p 8

¹⁴¹ <http://www.dti.gov.za/bee/beecodes.htm>

¹⁴² *The definitive BEE hand book*, Akollo, H. Ossang, p 4

standard field of play for all entities operating in South Africa's economy, although technically applying only to organs of the state and public entities.¹⁴³ The government must apply them when taking economic decisions on procurement, licensing and concessions, public-private partnerships and the sale of state-owned assets or businesses.¹⁴⁴ Private companies must apply the Codes of Good Practice if they want to do business with any government enterprise or organ of state, for example apply for licenses and concessions, buy state-owned assets or enter into public-private partnerships. Companies are also encouraged to apply the Codes of Good Practice when interacting with each other, seeing as how preferential procurement will affect most private companies through the supply chain.

The B-BBEE Act also provides for the development of the B-BBEE Generic Scorecard, which today is an integral part of the BEE system. The new BEE bases its measurement through the Generic Scorecard on seven core elements, equity ownership, management and control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development.¹⁴⁵ The seven core elements each represent the codes 100-700.¹⁴⁶ Companies measure BEE based on the score system and receive points and with that also recognition, for higher BEE compliance.¹⁴⁷ The Generic Scorecard measures company's empowerment progress through direct empowerment; ownership and control of enterprises and assets; management at a senior level; human resource development and employment equity and indirect empowerment through preferential procurement, enterprise development and corporate social investment.¹⁴⁸ Direct empowerment emphasizes increasing black people's ownership and control of the economy, for example ownership of assets and enterprises. It includes genuine participation in decision making and other active measures. It does also however include passive ownership of assets in the form of funds and trusts and other collective investments. Given the apartheid legacy of systematic labour market discrimination and inferior education for black people, the Generic Scorecard recognizes the importance of accelerated skills and advanced professional skills development. Indirect empowerment means mainly preferential procurement, both when it comes to the public and the private sector.

¹⁴³ *The definitive BEE hand book*, Akollo, H. Ossang, p 4, www.dti.gov.za/bee/beecodes.htm

¹⁴⁴ www.dti.gov.za/bee/beecodes.htm

¹⁴⁵ *The definitive BEE hand book*, Akollo, H. Ossang, p 22

¹⁴⁶ Black Economic Empowerment Supplier Questionnaire, 2008, p 2

¹⁴⁷ *The definitive BEE hand book*, Akollo, H. Ossang, p 22

¹⁴⁸ www.dti.gov.za/bee/beecodes.htm

The Generic Scorecard makes distinction between the compliance requirements for smaller and larger companies, disregarding the size of workforce, using only the turnover of the company to define to what category it belongs.¹⁴⁹

In addition to the new Codes of Good practice and the Generic Scorecard, the B-BBEE Act also calls for transformation charters to be established in key sectors of the economy.¹⁵⁰ This is to be done by public and private stakeholders in the respective industries, so that each industry has a uniform approach to empowerment and how it is measured.¹⁵¹ Thus, both public and private companies have to comply with these. Currently there is still activity in the area of charter development, with some finished and some on the way. So far some of the biggest and most important ones are the Mining charter, Maritime charter, Tourism charter and the Financial Services charter. The Codes of Good Practice play a big role in this development, seeing as how they provide a standard framework for the measurements of BEE across all sectors of the economy. Thereby no industry will be disadvantaged over another when presenting BEE credentials.

V. OBSERVATIONS AND ANALYSIS

6. Discussing Black Economic Empowerment

There are about as many different opinions on Black Economic Empowerment, and the affirmative action part of the BEE system, as there are inhabitants of South Africa. BEE has been seen as a post-apartheid intervention to address the systematic exclusion of a majority of South Africans from full participation in the economy, as well as a system of discrimination that while turning people into puppets, is repeating the wrongs of the past. BEE has been described as political effort to give redress, but also a system that primarily benefits a small, very wealthy ANC-connected empowerment elite called the “Fab Four”, and that BEE has not helped the people, the working class, who need them the most.¹⁵² BEE has been viewed as a necessity for the sake of the socio-economic functioning of the country and a process seeking nationwide equality, and as nothing but reversed apartheid.

¹⁴⁹ *The definitive BEE hand book*, Akollo, H. Ossang, p 5

¹⁵⁰ *The definitive BEE hand book*, Akollo, H. Ossang, p 28

¹⁵¹ *The definitive BEE hand book*, Akollo, H. Ossang, p 28

¹⁵² Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

No matter what opinion one has, Black Economic Empowerment has had a profound effect on the country's economy. The last decade BEE transactions represented closely to 200 billion Swedish Crowner.¹⁵³

In the 2006 election, 66 percent voted for ANC and their BEE politics. 34 percent however, did not. Ever since the birth of the BEE system it has been the object of a lot of criticism, both good and bad. In their attempt to redress the effect of apartheid, BEE fast became one of the most controversial policies of the ANC government.

The component of the BEE-systems that is the target of the most criticism is the BEE-goal to create equality in the workforce by enforcing the advantages of the previously disadvantaged and disadvantaging the previously advantaged. In 1994 an attitude survey was made on the subject of affirmative action. The result was that 61 percent of the South African population with the right to vote, wanted *only* a person's qualifications to be taken into considerations in an employment situation.¹⁵⁴ In 1996 a new survey was undertaken, where the people were giving alternatives of how they thought employment equity should be obtained. One of the alternatives was the one that is now in the Employment Equity Act. Only a half of the South Africans supported that alternative.¹⁵⁵ Another survey was undertaken in the year of 2000, which showed that the support for affirmative action, like formulated in the Employment Equity Act, had gone down from slightly more than half of all South Africans, till slightly less than half.¹⁵⁶ These results may seem surprising seeing as how the majority of South Africans are black, thus belonging to the group of previously disadvantaged who are the people these rules are targeting. However, even though the rules are made to be beneficiary for black people, it often backfires seeing as how the majority of black people - in comparison to the majority of white South Africans - lack in education and therefore does not have sufficient qualifications to even be considered for an employment.¹⁵⁷ The black working class has during the last century been struck hard by mass-unemployment and during apartheid they struggled against affirmative action when it used to benefit white South Africans. It is therefore understandable black people's hesitance and reluctance towards affirmative action in general, when it is being used as a tool to conquer the injustices in the country, created in

¹⁵³ www.southafrica.info/business/trends/empowerment/bee.htm

¹⁵⁴ www.sverigemotrasism.nu

¹⁵⁵ www.sverigemotrasism.nu

¹⁵⁶ www.sverigemotrasism.nu

¹⁵⁷ www.sverigemotrasism.nu

the first place by apartheid.¹⁵⁸ The main beneficiaries when it comes to the laws and rules providing for affirmative action, is the growing black middle class.¹⁵⁹ Through BEE the government is trying to correct this, but they receive heavy critic for failing to reach out to the people that need them the most.¹⁶⁰ One of the goals of the Codes of Good Practice is to ensure that BEE not only benefits the black elite, but also women, workers, the youth, people with disabilities and the rural poor and have been found flexible and to close many loopholes.¹⁶¹ Since the development of the affirmative action concept and the Employment Equity Act, progress has been made.¹⁶² It has helped and given opportunities to black people, women and disabled, but not to that extent that the government had planned.¹⁶³ A problem with Employment Equity Act is that it focuses primarily on high positions, like management position.¹⁶⁴ Even though, hypothetically, every single position as such would be filled by a previously disadvantaged black person, the total would still only represent approximately ten percent of the South African population.¹⁶⁵ The right to work is practically the only area within the field of economic, social and cultural rights that is not included in the South African Constitution.¹⁶⁶ The level of unemployment was under 2007 up to 40 percent of the total population of South Africa, and therefore one of the biggest problems the country is facing today.¹⁶⁷ Black working class people are the ones mostly suffering because of unemployment. At the same time there is a lack of qualified manpower in some sectors. The number of employment is changing in the right direction, even if progress is slow.¹⁶⁸ South Africa has signed the eight central conventions of the UN agency International Labour organization, which main goals are to promote the right to decent and productive work in conditions of equity, freedom and human dignity.¹⁶⁹ The South African Constitution protects the freedom to go on strike and form organizations. There are strong unions, a commission for

¹⁵⁸ www.sverigemotrasism.nu

¹⁵⁹ www.sverigemotrasism.nu

¹⁶⁰ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁶¹ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁶² *Making Mistakes, Righting Wrongs*, Gqubule, Duma, p 185

¹⁶³ *Making Mistakes, Righting Wrongs*, Gqubule, Duma, p 185

¹⁶⁴ *Making Mistakes, Righting Wrongs*, Gqubule, Duma, p 185

¹⁶⁵ *Making Mistakes, Righting Wrongs*, Gqubule, Duma, p 186

¹⁶⁶ The Constitution of the Republic of South Africa, Ministry of Foreign Affairs report; *Mänskliga rättigheter i Sydafrika 2007*

¹⁶⁷ Ministry of Foreign Affairs report; *Mänskliga rättigheter i Sydafrika 2007*

¹⁶⁸ Ministry of Foreign Affairs report; *Mänskliga rättigheter i Sydafrika 2007*

¹⁶⁹ www.ilo.org

mediation, retirement system and minimum wage. The system is moving forward. However, failure to always observe the rules and regulations is common.¹⁷⁰

Through the introduction of the concept of only unfair discrimination prohibition, legally BEE does not cause problems. BEE-pessimists claims however it in practice is backfiring in a number of ways. They say BEE is a nice idea but it does not work in practice as BEE is forcing BEE-considerations on people through which it becomes an obstacle in the way of economic growth.¹⁷¹ Forcing businesses to have to consider social background of their applicants instead of basing decisions purely on the person's individual qualifications and prior experience, may not be in the best interest of the company as the employer in an recruiting situation, due to BEE-regulation, might be forced to disregard possibly valuable personal assets.¹⁷² Amongst other things, it has been suggested that a policy of qualification equality should be used. It would enable businesses to employ the person with the highest qualifications, most experience and best recommendations. Affirmative action can also lead to people feeling that they are being judged only by their skin colour and not their skills. This leads to them feeling questioned, when later exercising their profession.¹⁷³

Critics also claim BEE is hurting the economy in another vital way, i.e. the supposition that the new rules and regulations South African companies have to abide by, would make them appear as if they are hard to deal with, in the eyes of the global economy.¹⁷⁴ BEE critics claim that instead of helping the economy, BEE actually is a drag on the economy as well as an investment killer, since the perceived complicity of the system is driving possible business and investors away.¹⁷⁵ To this BEE-followers respond that BEE is none of the above mentioned, but a key driver of corporate activity, such as mergers and acquisitions.¹⁷⁶ BEE followers usually maintain the position of BEE being the greatest thing to happen to South Africa as a country, as well as an economy, in decades and that it is the only way to obtain redress. They emphasize the need for BEE if true equality is ever going to leaven South Africa as a society and view BEE as a necessity to reach balance in the economy.¹⁷⁷ The

¹⁷⁰ Ministry of Foreign Affairs report; *Mänskliga rättigheter i Sydafrika 2007*

¹⁷¹ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁷² Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹⁷³ Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹⁷⁴ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹⁷⁵ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁷⁶ www.southafrica.info/business/trends/empowerment/bee.htm, Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁷⁷ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

introduction of BEE Codes of Good Practice and sector charters did undeniably result in an increase in BEE transactions.¹⁷⁸ In 2007, 153 transactions were carried out for a value of close to 96 billion Swedish Crowner. The value of BEE deals in 2006 was close to 56 billion Swedish Crowner.¹⁷⁹ According to a business owners survey made in 2006, 70 percent of business owners interviewed said that black empowerment was a key issue for them in winning business, compared to 60 percent in 2005 and 51 percent in 2003.¹⁸⁰

In mid 2008 however, the development changed. BEE was successful in terms of creating equity value for black partners until the economic crisis in mid 2008. Economic difficulties from mid 2008 have resulted in a marked decrease in BEE transactions, much due to difficulties in raising the required third-party financing for BEE transactions.¹⁸¹ This has led to a decrease in net equity values for the black partners especially, for the BEE deals that depended on high amounts of third-party debt funding.¹⁸² Of the public companies, it is estimated that approximately 25 percent are today are BEE compliant in that they fulfill sufficient BEE requirements as set forth in the Codes of Good Practice and the measurements in the Generic Scorecard.¹⁸³ Regarding private companies, it is difficult to say as these companies do not necessarily have to disclose their BEE status.¹⁸⁴ Implementation not only slowed but regressed in 2008.¹⁸⁵ Companies performed poorly, particularly in the management control, employment equity, skills development and ownership areas of the BEE scorecard.¹⁸⁶ A survey performed earlier this year showed that only 42 percent of the 500 South African participant companies, from all sectors of the economy, met the ownership element of the scorecard, compared to 57 percent in 2007. Management control was down from 54 percent in 2007 to 43 percent in 2008, and only 38 percent was achieved on the skills development element of the scorecard, which came down from 53 percent in 2007.¹⁸⁷ Employment equity, i.e. companies attempts to ensure that black people are represented at every level of their business, was down from 36 percent in 2007 to 34 percent in 2008.¹⁸⁸

¹⁷⁸ www.southafrica.info/business/trends/empowerment/bee.htm

¹⁷⁹ www.southafrica.info/business/trends/empowerment/bee.htm

¹⁸⁰ Consulting firm Grant Thornton's International Business Owners Survey 2006

¹⁸¹ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁸² Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁸³ www.busrep.co.za/index.php?fSectionId=2512&fArticleId=4930471

¹⁸⁴ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁸⁵ www.mg.co.za/article/2009-02-11-in-reverse-gear

¹⁸⁶ www.mg.co.za/article/2009-02-11-in-reverse-gear

¹⁸⁷ www.mg.co.za/article/2009-02-11-in-reverse-gear

¹⁸⁸ www.mg.co.za/article/2009-02-11-in-reverse-gear

Even though the BEE development has been positive for the most part over the last few years, there is a downside to this mostly positive development. There have been several cases, which the government knows of, that businesses has claimed false Black Economic Empowerment credentials to win contracts.¹⁸⁹ A number of companies with no BEE-status has illegally claimed to be headed by black people, and therefore defrauded the government of millions. They put up a front and some use skeleton companies.¹⁹⁰ This poses a problem, even though there is a rule that says that all contractors claiming BEE-status will have to submit an accreditation certificate that attests to their claim before they can do business with the government.

There is also danger, as well recognized by the government, that BEE in its strive for an equal society, turns to replacing the old white elite with a new black one leaving the status quo fundamentally the same, with an unequal society.¹⁹¹ The previously disadvantaged thereby become the advantaged, and the previously advantaged become the disadvantaged, which is not eliminating a problem, but merely moving it around. These problems were supposed to be addressed in the B-BBEE Act of 2003. BEE critics claim however that the reckless implementation of the affirmative action policy is forcing educated white people to leave the country, since BEE is making it difficult for them to be considered for new jobs, when companies – at least in a BEE context – benefit from hiring for example a black woman.¹⁹² It forces white academics to search for qualified work elsewhere. This emigration of white academics is creating a skill shortage crisis in South Africa and has become a reason for South African youth emigration.¹⁹³ Young people realize the problem and feel that they have no future in South Africa seeing as how they will not be able to get a job in the line of work they are trained for.

The ANC with their BEE and affirmative action politics is however by far the biggest and most powerful party in South Africa today. They do not run without challengers, but no one of the opposition parties are currently strong enough to pose as an actual threat. Going up

¹⁸⁹ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁹⁰ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁹¹ Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹⁹² Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

¹⁹³ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, Interview, Chief Executive Officer, Saab South Africa (Pty) Limited, Saloojee, Rias

against the ANC is however not without risk. Opposition parties are at a regular basis criticized for being racists, even when no such agenda exist in reality.¹⁹⁴

7. Discussing the present South Africa

The success of black South Africa is conditional of the success of white South Africa, and the success of white South Africa is conditional on the success of black South Africa.

Former president, Thabo Mbeki, 2005

15 years have gone by since the fall of apartheid and the dissolution of South Africa's last white minority government. During this time, the country has developed in many ways. South Africa as a country has gone through several different phases driven by the aspiration of equal rights, better living conditions and non-discrimination.¹⁹⁵

In the mid 1990's, Thabo Mbeki popularized the concept of the African Renaissance.¹⁹⁶ He called upon the people and nations of Africa to solve the many problems troubling their continent, to end the violence, poverty, corruption and crynoism that was weighing down the continent and to move towards a more just and equitable future. It was a call from South Africa to the continent, but it was just as much a call to South Africa itself.¹⁹⁷

A new democratic South Africa was born in 1994. The segregation laws and the white minority rule over the black majority has been replaced by an independent court system, a constitution protecting human rights and values, several other newly adopted laws, the system of Black Economic Empowerment, free press, market economy and an active civilian society, to name a few of the significant changes. The South African Constitution is considered to be very modern and progressive, especially when it comes to economic, social and cultural rights. There is no longer a legal basis for anything even reminding of apartheid.

As a whole, the country has, for a majority of the time since 1994, experienced economic growth.¹⁹⁸ The South African economy is currently performing well, especially considering

¹⁹⁴ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

¹⁹⁵ *History Making and Present Day Politics*, Stolten, Hans Erik, p 5

¹⁹⁶ *The young, the wealthy and the restless*, Bourgouin Frank, p 218

¹⁹⁷ *The young, the wealthy and the restless*, Bourgouin Frank, p 218

¹⁹⁸ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

the state of the nation 15 years ago and the current financial situation worldwide.¹⁹⁹ Economy stabilization has – in comparison to before – largely improved, providing a platform for accelerating the growth rate.²⁰⁰

Since the new political order, South African politicians have tried to re-establish South Africa's position both internationally, in trying to be recognized globally as a well-developed economy, and regionally, to be a central point of reference in Africa as the leading economy.²⁰¹ The South African economy has undeniably become more integrated into global markets, and has gradually won international trust back from the days of apartheid. It has re-emerged onto the continental and world stages, as a significant participant in political and economic contexts.²⁰²

South Africa has carried through numerous fundamental changes, and accomplished many of the goals set out by the government in 1994. The legal, political and economical environment is no longer what it once was. However, despite the legal progress, the changed political conditions and the economic gains made since the official ending of apartheid, the racial divide between rich and poor remains.²⁰³ Inequalities in wealth, skills and employment between black people and white people continue to exist and South Africa is still a socially battered society, with problems like poverty, segregation and inequality.²⁰⁴ The violence problem in the townships and the major cities is well-known outside the borders of South Africa, as is the serious AIDS-problem, where 1 out of five South African carry the HIV virus.²⁰⁵ Hotels in down town Johannesburg are forced to close because of crime. Approximately 50 people in South Africa are murdered every day, and the level of unemployment was under 2007 up to 40 percent of the total population.²⁰⁶ The gap between the two nations of South Africa prevails. Inequalities as such, in a society, can have a profound effect on the economy and political stability.²⁰⁷ Societies characterized by entrenched gender inequalities or racially or ethnically defined wealth differences are not likely to be politically and socially stable. Economic growth can easily exacerbate these

¹⁹⁹ South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 6

²⁰⁰ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi, South Africa's Economic Transformation: A strategy for Broad-Based Black Economic Empowerment, p 6

²⁰¹ *The young, the wealthy and the restless*, Bourgouin Frank, p 216

²⁰² *The young, the wealthy and the restless*, Bourgouin Frank, p 216

²⁰³ *State of the nation South Africa 2004-2005*, Daniel, John, Southall, Roger, Lutchman, Jessica, intro

²⁰⁴ *State of the nation South Africa 2004-2005*, Daniel, John, Southall, Roger, Lutchman, Jessica, intro

²⁰⁵ www.sida.se, *The definitive BEE hand book*, Akollo, H. Ossang, p 52

²⁰⁶ Ministry of Foreign Affairs report; *Mänskliga rättigheter i Sydafrika 2007, After Mandela – The battle for the soul of South Africa*, Russel, Alec, p 109

²⁰⁷ www.OAVM-africa.com

inequalities, which eventually could lead to problems preventing, and eventually completely put an end to, sustainable economic growth.²⁰⁸

In a complex situation such as this, many factors often has an influence, which also is the case in South Africa. Some of the more substantial reasons to why the economic reform did not work as good as planned during the first ten years after apartheid are high interest rates, partly low economic growth, governmental failure to incorporate new policies in a macro-economic context and the government initial reluctance to involve themselves to much in important key sectors.²⁰⁹ Problems also lie in the lack of program and rule implementation, as in the failure to observe them.²¹⁰ Lack of accountability is contributing to that fact. Lack of, or severely limited, financial and personal resources are also big problems that are slowing down progress.²¹¹ So is the ability to administrative coordination.

The still remaining issue of corruption, along with government failure to meet their goals, causes reluctance among the people to follow the government.²¹² Together with political bickering and scandals that has led to South African's mistrusting their government. The mutual criticizing of each other's politics that use to go on between the Democratic Alliance²¹³ former leader Tony Leon, and the former leader of the ANC, Thabo Mbeki, did nothing to strengthen the relationship between white South Africans and black South Africans. If anything, they made it worse. Leon claimed that Mbeki through his less diplomatic way of ruling, strengthened the polarization between black and white people, while Mbeki said that the DA only represent the privileged white South Africans. In the past, several party leaders accused former president Thabo Mbeki that his ANC government was leaning too much towards black South Africans in its policies on BEE, as well as for example poverty alleviation, language, gender parity, land reform, and reading of history. In responding to the claims, Mbeki said that his government was operating from the premise that South Africa belongs to all who live in it, consistent with the Freedom Charter and the South African Constitution, adding that both whites and black need each other for the country to succeed. In response to criticism, he has also said that to achieve this, both races has to agree to compromise, agree to fight racism and underdevelopment, and act together to achieve a common goal of national cohesion and a shared destiny within a common motherland.

²⁰⁸ www.southafrica.info/business/trends/empowerment/bee.htm.

²⁰⁹ *Making Mistakes, Righting Wrongs*, Gqubule, Duma, s 103

²¹⁰ *The definitive BEE hand book*, Akollo H. Ossang, p 52

²¹¹ Interview, Vice President Investor Finance, Investec, (Pty) Limited, Amosun, Tomi

²¹² *Base rapport 2008*, Olausen Jessica, Pretoria Embassy

²¹³ In the document referred to as DA

Even people on the same party have trouble getting along. Former president Thabo Mbeki, and the newly elected president of ANC and South Africa, Jacob Zuma, have the last couple of years been fighting a lot, even though they belong to the same party.²¹⁴ Conflicts like these is to the cost of the country, since energy and time goes to settling conflict within the party itself, instead of putting all resources to dealing with problems that the country is facing.

On the 11th of May, just a couple of days after Jacobs Zuma's inauguration, he addressed the Confederation of Black Business Organizations.²¹⁵ He said that South Africa needs to review the way in which BEE is put into effect, and while affirmative action and BEE had substantially increased the country's black middle class, he was not convinced that it has succeeded in addressing the structural economic and social inequalities in the South African society.

...We wish to emphasize that the ANC is committed to ensuring the continued implementation of our affirmative action as well as the BEE programmes...When we talk about a review of BEE, such a review should concern itself about how effective we are in applying this policy, how we can strengthen it so that it can better deliver for our the majority and thus become broad-based...We need to identify where the current bottlenecks are in implementation, and implement BEE in such a manner that it becomes genuinely broad-based and promotes the ownership and control of productive assets by black people, women and youth..

Jacob Zuma, speech to the Confederation of Black Business Organizations, 2009

Zuma said putting into effect BEE, which was meant to restore imbalances from apartheid, was always a challenge with many obstacles.²¹⁶ However, he confirmed the ANC's commitment to affirmative action as a policy, saying it was unthinkable for the ANC to abandon it.²¹⁷

²¹⁴ *After Mandela – The battle for the soul of South Africa*, Russel, Alec, p 232

²¹⁵ <http://www.southafrica.info/news/business/301907.htm>

²¹⁶ www.southafrica.info/news/business/301907.htm

²¹⁷ www.southafrica.info/news/business/301907.htm

8. Closing arguments

There is a saying; there are two sides to every coin. Nothing could be more accurate when it comes to BEE and the affirmative action rules. Although, regarding BEE I think that the coin is closer to having about fifty or a hundred sides, since the opinions range from BEE being something as horrifying as reversed apartheid, to that it is the best thing to happen to South African economy in a long time.

After having lived here in South Africa for two months now, it is clear to me that the remaining injustices following in the footsteps of apartheid still are many. Affirmative action is only one way, although a meaningful one, to come to terms with them and strive towards achieving an equal society.

The legal aspect, as to whether or not the affirmative action part of the Black Economic Empowerment system is lawful, is proven not to be an issue. Even though both national and international legislation include regulation stipulating that this can only take place provided that these measures do not lead to the maintenance of separate rights for different racial groups, as I stated above, neither the national frameworks nor the international frameworks, impedes or stand in the way of the employment of affirmative action measures, in order to eliminate racial discrimination and ensure equality and equal enjoyment of all human rights and freedoms, but agreed on it is a valid and necessary tool to deal with inequality problems. That does not however mean that the issue is dead, nor in every aspect; morally, socially or economically justifiable, as concluded from the above presented many difference of opinion in this matter. Even though it is there to benefit the previously disadvantaged groups, according to regular surveys and opinion polls, as stated above, still only about half of all South Africans are for affirmative action, whereas the other half is against it, claiming employment should only be based on a person's occupational qualifications. Thus, every other person is in South Africa today, is opposing to the form of affirmative action that the Employment Equity Act stipulates. The Employment Equity Act, together with the rules and regulations in e.g. the Constitution, has undeniably fueled progress, and contributed to achieving equality in society, but not to that extent that the government had hoped. The fact that the Employment Equity Act is focusing primarily on high positions, like management position, is a problem that needs attention. I think focus needs to move from management to also including the larger part of the workforce, the black working class. I also think it is important for the government to focus on previously disadvantaged achieving the

qualifications, education and experience necessary for them to be considered for employment, without it causing mistrust. I think the government should put more emphasis on early high-quality education, and subsidize companies that employ entry level applicants.

As I mentioned above, a common critic is that BEE is forcing BEE-considerations on people, which when done in a business environment might in fact cause barriers to economic growth. BEE make businesses consider social background of possible employees instead of solely basing decisions on a person's individual qualifications and prior experience, for the sake of creating equality of the workforce. I believe such decisions may not always be in the best interest of the company, when it can cause the employer to lose valuable personal assets that could help bring the company forward and thereby strengthening the economy at large. I also think it can cause previously disadvantaged people to feeling questioned, when exercising their profession. This can act a deterrent to progress of the company, as it can fuel conflicts in the work place and cause staff to perform below usual results.

I also see that BEE makes it harder for educated white people to be considered for new jobs, and that fact is a reason to why white academics are forced to search for qualified work elsewhere, possible outside of the country. Today South Africa is the number one economy in Africa. Ever since 1994 the leaders of South Africa has been putting a lot of faith in, and counting on the economy to help them get through these though times. When educated people are more or less forced to leave the country however, the government plan backfires. It does not bring the country forward as an economy, but creates new difficult problems. An emigration of well-educated worker is not what a country depending so heavily on economic growth need. The situation causes a skill shortage, which leaves South African companies without enough valuable human resources. If the government let this trend continue, I think it is really going to hurt South Africa as an economy.

Considering the violent history of abuse and discrimination, the main principle that now leavens through the new frameworks is the one of equality before the law. As stated above, the prohibition against only unfair discrimination however, to correct the inequalities in South Africa, is the object of a lot of criticism. I think the legal construction as such, raises several questions. First is the question of definition; exactly what conduct is considered to be merely fair discrimination? What behavior constitutes unfair discrimination, totally in breach of the main principle of equality in the Constitution of the Republic of South Africa? There are no clear, exhaustive answers. Uncertainty about what one can and cannot do, creates a non-

streamlined system, where neither one of parties involved knows how to act and what to expect from the system. Does the rule actually result in acts of discrimination taking place, with decision-makers hiding behind legal formulations?

There are also the questions whether or not BEE is socially justifiable, let alone morally defensible, for a country, especially one with a history like South Africa, to in its Constitution have provisions that possibly open up doors for pure discrimination? Is it allowed for the sake of higher purpose? For the greater good of the people and society? If everyone were to abide by that rule, the world as we know it today would look a lot different, and this discussion would come frighteningly close to ideas and constitutions a majority of the countries of the world left behind years ago.

I think that BEE also constitutes an ethical dilemma. I believe no person should be reduced and degraded to an object, simply a mean for society to use to reach a higher purpose. Discrimination is always discrimination, regardless of good intentions. I think the continuing of categorizing of people, act as a clear reminder of that people are different. Not in the same racist way as before, but it is still however, a reminder, which in itself fortifies the social rift between black people and white people. Even though it is now not being done with the purpose of segregation and discrimination but to fight the inequalities in society. However, I am convinced that the economy never will experience true equality without some sort of rule stipulating the enforcement and advancement of the previously disadvantaged, backed up by a rule such as the rule of prohibition of unfair discrimination. Having this fortified in the South African Constitution is even better as it brings power and a sense of unity to it in ways other laws could never achieve. Some people say that BEE and affirmative action is the only way to reach true equality in South Africa. I disagree it is the only way. The way it is being used right now is one of the compromises that the people of South Africa have to make, that both Mandela and Mbeki have mentioned several times when addressing the nation. To describe my thoughts on BEE I would however like to make a parallel to Winston Churchill's thoughts on democracy:

Democracy is the worst form of government, except for all those others that have been tried.

Winston Churchill, Speech, 1947

I think BEE is far from flawless but I do not think that South Africa will be able to change without it.

I have heard BEE been described as the greatest strategic issue, challenge, threat and at the same time potential opportunity facing all businesses in South Africa today. The period since 1994 has seen the South African legal, social, political and economical environment undergo profound restructuring, with the Black Economic Empowerment system as one of the main pillars.

Despite the economic successes and the broad range of laws, policies, strategies and BEE interventions aimed at overcoming economic disparities, as stated above, entrenched inequalities continue to characterize the South African economy and act as deterrent to growth, economic development, employment creation and poverty eradication. Vast racial and gender inequalities in the distribution of and access to wealth, income, skills and employment persist. Much progress has been recorded in undoing the South African legacy of the past but the extent to which the economic growth has been shared by all South Africans however, is still inadequate for the requirements of a stable, equal and healthy society. As I mentioned above, can economic growth easily exacerbate these inequalities, which eventually could lead to problems maintaining economic growth. South Africa's strive towards strengthening the country's position on the global as well as the regional market, cannot be accomplished, unless they have a healthy political, economical, social climate.

South Africa's re-integration to the global market means that it as a country not only gets to reap the benefits of globalization, but is also exposed to the possible negative aspects of such a process. Globalization can further entrench already existing inequalities as well as further marginalize people in periphery that stand without means or ability. Increased inequality and uneven development poses a threat to all economies, but especially one with a history like South Africa. I believe that a fundamental economic transformation strategy like BEE, need to especially be aware of these dangers, avoid the pitfalls and ensure that everyone benefit from

the process. The socio-political and moral reasons for redress, are the same as for economic growth. The South African economy is by far the internationally strongest one in Africa with the most potential to be better, but with these internal problems, I am convinced that South Africa will continue to perform below its potential.

When change knocks on ones doorstep but insecurity still prevails, the people of a country look to their leaders to guide them. The greatest leaders of our time, like Winston Churchill and John F. Kennedy, had to escort their countries through troubled times. I think problematic times is when a leader should truly step up, make the tough decisions, be an inspiration to the people and help guide their country through the hard times. An unstable country needs strong leaders able to guide them through times of difficulty, which I think South Africa during some periods of time has been lacking. When BEE was conformed into B-BBEE, one of the realizations that the government had made was that for this to reach true success this time, it had to include and involve everyone in South Africa. What I think is even more important is that it has to matter for everyone in South Africa. They need commitment and cooperation from all parts of the society, including the country's leaders. The sometimes hostile relationships and constant antagonism between the political leaders of South Africa is neither setting a good example for openness, forgiveness and kindness for the country's citizens, nor helping in the resolving of an already severely infected conflict.

As stated above, the problems of South Africa are still many and still severe. Yet while the economy has grown, rampant inequalities have remained. Violence is endemic in townships and main cities. Race relations are fraught as whites struggle to find their place in the new order. Former president Thabo Mbeki's denial of the AIDS epidemic has led to thousands of unnecessary deaths and has been both morally and politically disastrous. His failure to check the abuses of Robert Mugabe's dictatorship in Zimbabwe has, once again, tarnished South Africa's reputation internationally. South Africa should be the continents greatest hope, yet it is a country filled with inner struggles. Even though many South African's are happy about Jacob Zuma's recent presidential winning, uncertainty over the path of the country has definitely intensified since he, the charismatic populist accused of rape and corruption, became Nelson Mandela's second successor in the ANC in 2007 and the country's new president in 2009. I wonder if Zuma's take over will signal the start of an unhappy new chapter in the post apartheid story or will things improve?

After having lived here for two months I see with my own eyes that the wounds from apartheid still are fresh. Sure 15 years has past, but put in this historical context, 15 years is nothing. I think the Truth and Reconciliation Committee was grand in so many ways, but for people who has seen apartheid, lived apartheid, breathe apartheid, it must take more than 15 years – maybe not to forgive – but to move past it.

You only have to walk the streets of South Africa, to be able to hear the subtle but clear echo of apartheid. Sure the “whites only” benches and restaurants are not there anymore, but the majority of black people and white people still live different kinds of lives. Thabo Mbeki’s “two Nation” speech still reflects, in many parts, the truth. Black people and white people are divided socially by their inheritance, but also because that is what they are use to. Many black people stay in the townships because they have to, but many also stay because they want to, because that is what they know.

The economic rift is also evident as I personally have experienced during my stay in South Africa. For example, the woman who comes to clean the house where I live is not white, and neither is the one who brings the food when I eat lunch at a restaurant. The business men having lunch at the next table however are. The twenty guys standing on the driving range hitting bucket after bucket are white as oppose to the guy who handles the distribution of balls. I am yet to see a black man driving the latest Lexus, but my neighbor has got two in his four-car garage. Sure there are exceptions to my examples, they are there, but the equality strived for is far from it.

Some sadness colour these last words, but several times of having heard white South Africans make derogatory comments of black South Africans behind their backs will do that to a person. I think South Africa needs time. Time not to forget but to get some distance from the horrors of the past. Time for feelings like anger, sorrow, guilt and remorse to fade. Time for society and the economy to grow, to learn from mistakes and move past them.

The journey from the year of 1994 when BEE was born, when Nelson Mandela led the ANC to victory, to the year of 2009 and Jacob Zuma, is really a legal, political, economic, social and moral epic, with the fate of South Africa at its core.

There is no doubt in my mind that South Africa will get there, and with the help of BEE I think they will get there faster. They just need more time.

Making new laws is easy. Changing the minds of people is hard.

Me

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